Supreme Court, U. S.
FILED
SEP 18 1978
ODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-286

GARRISON FRAZIER - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for Writ of Certiorari to the
Court of Appeals of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT F. STEPHENS
Attorney General
Capitol Building
Frankfort, Kentucky 40601

JAMES L. DICKINSON
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

GEORGE M. GEOGHEGAN, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

INDEX

	PAGE
Table of Authorities	ii–iii
Counterstatement of the Questions Presented	1– 2
Opinion Below	2– 3
Constitutional and Statutory Provisions Involved	3
Jurisdiction	3– 6
Reasons for Not Granting the Writ	6–12
Conclusion	13
Proof of Service	14

TABLE OF AUTHORITIES

Cases:

	PAGE
Andresen v. State of Maryland, 427 U. S. 463 (1976)	5
Bell v. State of Maryland, 378 U. S. 226 (1964)	5
Cardinale v. Louisiana, 394 U. S. 437 (1969)	5
Carson v. Commonwealth, Ky., 382 S. W. 2d 85 (1964)	11
Chapman v. California, 386 U. S. 18 (1967)	12
Cotton v. Commonwealth, Ky., 454 S. W. 2d 698 (1970)	8, 9
Denton v. Commonwealth, 188 Ky. 30, 221 S. W. 202 (1920)	9
Ellison v. Commonwealth, 272 Ky. 364, 114 S. W. 2d 130 (1938)	9
Etherton v. Commonwealth, 246 Ky. 553, 55 S. W. 2d 343 (1932)	9
Grigsby v. Commonwealth, 299 Ky. 721, 187 S. W. 2d 259 (1945)	9
Hardin v. Kentucky Utilities Company, 390 U. S. 1 (1968)	12
Harrington v. California, 395 U. S. 250 (1969)	12
Hendron v. Commonwealth, Ky., 487 S. W. 2d 275 (1972)	8, 10, 11
Henry v. State of Mississippi, 379 U. S. 443 (1965)	5
Laine v. Commonwealth, 287 Ky. 134, 151 S. W. 2d 1055 (1941)	9–10
Lair v. Commonwealth, Ky., 330 S. W. 2d 938 (1960)	4
Marcum v. Commonwealth, Ky., 256 S. W. 2d 22 (1953)	4
Michelson v. United States, 335 U. S. 469 (1948)	8, 10, 11
Milam v. Commonwealth, Ky., 275 S. W. 2d 921 (1955)	11
Monks v. New Jersey, 398 U. S. 71 (1970)	5, 8
Rudolph v. United States, 370 U. S. 269 (1962)	12
Sebastian v. Commonwealth, Ky., 436 S. W. 2d 66 (1969)	7

Cases: (Cont'd)

	PAGE
Shackleford v. Commonwealth, 270 Ky. 60, 109 S. W. 2d 13 (1937)	7
Spencer v. Commonwealth, Ky., 467 S. W. 2d 128 (1971)	4, 8
Tacon v. Arizona, 410 U. S. 351 (1973)	5
Taylor v. Commonwealth of Kentucky, ___ U. S. ___, 98 S. Ct. 1930 (1978)	4
United States v. Orgeon, 366 U. S. 643 (1961)	12
Urbanski v. Commonwealth, Ky., 526 S. W. 2d 7 (1975)	11–12

Federal Constitution:

Amendment VI	5, 6
Amendment XIV	5, 6

Federal Statute:

28 U.S.C. 1257(3)	3, 6, 13

Other Authorities:

Supreme Court Rule 19	3, 6, 11, 12, 13
Kentucky Civil Rule 76.32(b)	4
Kentucky Civil Rule 76.20(9)(c)	4
Kentucky Criminal Rule 9.70	5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

GARRISON FRAZIER - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED[1]

(1) Whether the trial court in admonishing the jury deprived the petitioner of his Fourteenth Amendment right to due process of law?

(2) Whether the trial court deprived the petitioner of his Sixth Amendment right to confrontation of

[1]In framing the questions presented, the petitioner chose to present two issues for this Court's consideration. The second question, however, has, in addition to its principal contention, four separate sub-issues. For purposes of clarity, the Commonwealth has elected to treat the sub-issues as separate substantive questions.

witnesses when it ruled that the hearsay statements of co-defendant Hays were admissible as evidence?

(3) Whether the trial court deprived the petitioner of his Fourteenth Amendment right to due process of law when it questioned the petitioner as to the present location of co-defendant Hays?[2]

(4) Whether the trial court deprived the petitioner of his Fourteenth Amendment right to due process of law by permitting the Commonwealth's Attorney to cross-examine the petitioner's character witness as to his present knowledge of petitioner's arrest record?

(5) Whether the admission of a photograph depicting the petitioner's appearance at the time of arrest deprived the petitioner of his Fourteenth Amendment right to due process of law?

(6) Whether the Court of Appeals erred in ruling harmless the errors, if any, of the trial court?

OPINION BELOW

The Opinion below from the Court of Appeals of Kentucky *as modified* is styled Garrison Frazier v. Commonwealth of Kentucky and is unpublished. The Supreme Court of Kentucky on May 16, 1978, declined to exercise its judicial discretion to review the Opinion of the Court of Appeals of Kentucky. On July 21, 1978, the Supreme Court of Kentucky refused to reconsider its order denying petitioner's motion for discretionary review. The Opinion of the Court of Appeals of Kentucky, the Opinion of the Court of Appeals of Kentucky as modified, the Order of the Supreme Court of Kentucky denying petitioner's motion for discretionary review, the Mandate of the Court of Appeals of Kentucky, and the Order of the Supreme Court of Kentucky denying the petitioner's motion for reconsideration are all correctly set forth in the appendix of the petitioner's petition for writ of certiorari, commencing with page 1a of the brief.

[2]Although Hays was jointly indicted with the petitioner, he failed to appear for trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has correctly set forth in his brief all of the constitutional and statutory provisions needed to resolve the issues presented.

JURISDICTION

Petitioner's application for a writ of certiorari to the Court of Appeals of Kentucky does not comply with the prerequisites of either 28 U.S.C. 1257(3) or Rule 19 of this Court. Accordingly, the petition should be dismissed. A brief review of the issues presented to the trial court will demonstrate the validity of the Commonwealth's position.

Petitioner's primary argument is grounded upon a contention that the trial court gravely prejudiced the rights of the petitioner when in the course of its admonishment it remarked that the jurors were probably forming an opinion as to the petitioner's innocence

or guilt. The petitioner did not object to the remark at trial and this issue was not presented on appeal to the Court of Appeals of Kentucky.[3] The issue as to whether the admonishment constituted reversible error was not presented in the petitioner's petition for rehearing.[4] On motion for discretionary review this issue was finally raised. After the motion was summarily denied by the Supreme Court of Kentucky, the petitioner represented the issue in a motion for reconsideration and relied on *Taylor* v. *Commonwealth of Kentucky,* —— U. S. ——, 98 S. Ct. 1930 (1978). Again, the Supreme Court of Kentucky denied the petitioner any further relief.

In examining the procedural history of this matter, it is evident that under the rules of procedure of Kentucky this issue has not been properly preserved for appellate review. *Cf. Spencer* v. *Commonwealth,* Ky., 467 S. W. 2d 128 (1971); *Marcum* v. *Commonwealth,* Ky., 256 S. W. 2d 22 (1953). Since the issue was not presented in the initial appeal, the question, despite the original waiver, cannot be reviewed in a petition for rehearing or other subsequent proceedings. See Kentucky Civil Rule 76.32(b), 76.20(8)(c);[5] *Lair* v. *Commonwealth,* Ky., 330 S. W. 2d 938 (1960). Consequently, this alleged federal question was never

[3]This issue, however, was raised during oral argument. The appellate court did not discuss the merits of the contention in its Opinion.

[4]The Opinion was modified due to slight misstatement of fact in the original Opinion.

[5]The petitioner acknowledged this procedural barrier in footnote one (1) of his petition for writ of certiorari. See petitioner's brief, pp. 4-5.

before the courts of Kentucky and, therefore, it is quite obviously not subject to review by this Court. *Monks* v. *New Jersey,* 394 U. S. 1 (1970). See also *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969); *Tacon* v. *Arizona,* 410 U. S. 351 (1973).[6]

Turning now to the petitioner's second question consisting of four separate issues, it is the contention of the Commonwealth that none of these issues were presented in the initial briefs on appeal as substantive federal questions. All of the questions below were resolved on the basis of state grounds. Thus, the petitioner is presenting for the first time an allegation that these alleged errors violated the rights of the petitioner as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States. Under the decisions of this Court, these errors are not subject to consideration. This Court has consistently held that the existence of an independent state ground would preclude review of a related federal question. *Henry* v. *State of Mississippi,* 379 U. S. 443 (1965). In this case, it is obvious that the Opinion of the Court of Appeals of Kentucky was entirely based on considerations of state procedural rules and applicable Kentucky decisions. Unless there exists an extraordinary constitutional situation, state interpretations of state statutes are binding on this Court. *Bell* v. *State of Maryland,* 378 U. S. 226 (1964).

[6]The petitioner's argument is also subject to attack on the grounds that the nature of the controversy presents a separate, independent state question. The matter involves a construction of RCr 9.70, a rule of criminal procedure. Under the rules of this Court, the existence of a separate state ground ordinarily precludes review. *Andresen* v. *State of Maryland,* 427 U. S. 463, 478 fn. 9 (1976).

In conclusion, the petitioner's efforts to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3) is without appreciable merit.

REASONS FOR NOT GRANTING THE WRIT

The question of whether the petitioner has properly fulfilled the requirements of 28 U.S.C. 1257(3) notwithstanding, it is evident that petitioner has failed to present sufficient grounds under Rule 19 to justify the invocation of this Court's discretionary power to review.

As previously noted, the petitioner's second argument raises a number of distinct issues. Although they are resolvable under state authority, it is apparent that under federal law the trial court's ruling did not violate either the Fourteenth or Sixth Amendment rights of the petitioner. A brief survey of the petitioner's issues will demonstrate their inherent lack of merit. For purposes of this survey, the respondent accepts as substantially correct the statement of the case as presented in petitioner's brief, pp. 3-8.

Initially, the petitioner complains that the trial court erroneously permitted the introduction of certain hearsay statements that were made by co-defendant Hays. An examination of the facts as presented by the petitioner reveals that Hays made two statements about the gun. The first statement was an absolute denial of any knowledge. The second statement was in the nature of an exculpatory explanation. According to Hays, they had found the gun and, because they had gotten scared, he placed it under the car. Absolutely nothing was said by Hays that could possibly incriminate the petitioner. The petitioner maintains, however, that since the credibility of the story was weak, it necessarily damaged his credibility. Assuming that this argument has merit, it must be noted that the real damage to the petitioner's case occurred when the officer testified that he saw the gun being placed under the car. The unexplained possession of the gun plus the evidence of the forcible entry was enough to prove up a prima facie case. The prejudice, if any, that occurred therefore was slight.

The respondent must frankly confess that it finds the petitioner's contention somewhat confusing. This confusion stems from the fact that the objectionable statement is exculpatory in nature, and not incriminating. If the situation were reversed, with the petitioner attempting to gain admission for the statement, the trial court under Kentucky law would undoubtedly rule against him on the grounds that the statements were inadmissible for being self-serving. See *Sebastian* v. *Commonwealth,* Ky., 436 S. W. 2d 66 (1969), and *Shackleford* v. *Commonwealth,* 270 Ky. 60, 109 S. W. 2d 13 (1937). This Court should note that the Court of Appeals of Kentucky concluded that this issue was without merit for the self-evident reason that Hays' statements were exculpatory. See petitioner's appendix, p. 2a.

The petitioner also alleges that the trial court exhibited a prejudicial bias toward him when it asked the petitioner about the current location of Hays. No objection was entered by the petitioner. For reasons

previously set forth as to the effect of noncompliance with the procedural rules of Kentucky, it is not necessary or expedient to address the merits of this issue. *Spencer* v. *Commonweath, supra; Monks* v. *New Jersey, supra.*

A more significant issue is the contention that the Commonwealth improperly cross-examined a character witness as to the extent of his familiarity with the petitioner's background. As will be seen, both *Hendron* v. *Commonwealth,* Ky., 487 S. W. 2d 275 (1972), and this Court's decision of *Michelson* v. *United States,* 335 U. S. 469 (1948), dispose of the petitioner's allegation of error.

Petitioner propounds as part of his argument the contention that a so-called "Cotton"[7] violation occurred when the Commonwealth's Attorney inquired of a defense witness, who was testifying as to the petitioner's reputation for honest and fair dealing, whether the witness was aware that the petitioner had been arrested for theft by unlawful taking. The witness replied in the negative. An objection was entered by the petitioner but an admonition was not requested. Petitioner now contends that this question constituted prejudicial error on the theory that the "Cotton" rule as set forth in *Cotton* v. *Commonwealth,* Ky., 454 S. W. 2d 698 (1970), specifically states that a witness' credibility can only be impeached by way of convictions of

[7]Referring to *Cotton* v. *Commonwealth,* Ky., 454 S. W. 2d 698 (1970), forbidding the impeachment of the defendant or other witness with prior felony convictions unless it could be affirmatively shown in a hearing that the prior felony conviction has a bearing on the truth or veracity of the testifying witness.

crimes involving dishonesty or stealing. Since the petitioner was never convicted of this crime, the petitioner argues that the use of this arrest charge was improper and prejudicial. In response, the Commonwealth points out that the requirements of *Cotton* v. *Commonwealth, supra,* are not applicable to the facts of this case.

The "Cotton" prohibition is not at issue for the simple reason that it was the petitioner's character, not his credibility, that was at stake. It is settled in Kentucky that once the defendant has introduced good character as an issue, the prosecution may rebut it, *Grigsby* v. *Commonwealth,* 299 Ky. 721, 187 S. W. 2d 259 (1945); *Denton* v. *Commonwealth,* 188 Ky. 30, 221 S. W. 2d 202 (1920). Rebuttal can take two forms. The first device is to call witnesses who will testify as to the bad reputation of the witness, *Denton, supra.* The other device involves impeaching the credibility of the character witness.

Generally, the credibility of the witness can be impeached by demonstrating that the witness was not familiar with the defendant's reputation, *Etherton* v. *Commonwealth,* 246 Ky. 553, 55 S. W. 2d 343 (1932), and *Ellison* v. *Commonwealth,* 272 Ky. 364, 114 S. W. 2d 130 (1938). Although reputation cannot be proved by knowledge of specific acts of conduct, the credibility of a witness can be destroyed by showing ignorance of specific facts. Questions regarding previous arrests or convictions are permitted, *Laine* v. *Commonwealth,* 287 Ky. 134, 151 S. W. 2d 1055 (1941). In *Laine,* the

Supreme Court of Kentucky considered the precise contention that the petitioner has raised and concluded:

> "It is competent for the Commonwealth on cross-examination of character witnesses to ask them if they have heard of such charges being made against the defendant, but it is only competent for the purpose of testing the recollection or information of the witnesses relative to defendant's general reputation; and where there is an objection to such testimony, or a motion to limit its effect, the court should admonish the jury that it is admitted for the sole purpose of testing the accuracy or credibility of the witness and not as substantive evidence of defendant's guilt." *Laine, supra* at 1057.

Accord, Hendron v. *Commonwealth, supra.*

This proposition is directly supported by this Court's decision of *Michelson* v. *United States, supra.* In *Michelson,* the appellant argued that the inquiry of a defense witness as to whether he had heard that the appellant had been previously arrested for possessing stolen goods was prejudicial error. The Court concluded that it was not, and in so concluding said:

> "It was proper cross-examination because reports of his arrest for receiving stolen goods, if admitted, would tend to weaken the assertion that he was known as an honest and law-abidding citizen. The cross-examination may take in as much ground as the testimony it is designed to verify. To hold otherwise would give defendant the benefit of testimony that he was honest and law-abiding in reputation when such might not be the fact; the refutation was founded on convictions equally persuasive though not for crimes exactly repeated in the present charge." *Michelson, supra* at 484.[8]

In light of *Michelson* and *Hendron,* it is clear that the tactics employed by the Commonwealth's Attorney did not violate any of the petitioner's rights to a fair trial. The soundness of the legal theory relating to the proper impeachment of the credibility of a character witness precludes under Rule 19 further consideration of the issue by this Court.

Finally, the petitioner bitterly complains about the admissibility of a photograph displaying his appearance at the time of his arrest. It should be stressed that the picture was not a mug shot and there was a total lack of any indication that the petitioner had previously been involved in criminal activities.

The introduction of the photograph did not prejudice the jury. Reference is made to the long hair of the petitioner in the photgraph, but no reference to the physical characteristics of the petitioner was ever made by the Commonwealth's Attorney. The photograph was innocent in appearance and could not possibly influence the minds of the jurors. Although the photograph was not helpful, it certainly was not harmful, *Milam* v. *Commonwealth,* Ky., 275 S. W. 2d 921 (1955), *cert. den.* 349 U. S. 964, 75 S. Ct. 897, 99 L. Ed. 1286 (1955); *Carson* v. *Commonwealth,* Ky., 382 S. W. 2d 85 (1964); and *Urbanski* v. *Commonwealth,* Ky., 526

---

[8]The Court of Appeals of Kentucky specifically relied on *Michelson* when it concluded that the petitioner's allegations were without merit. See petitioner's appendix, pp. 2a-3a.

S. W. 2d 7 (1975). The petitioner's last contention is devoid of merit and does not present a significant constitutional question.

Before concluding, it is interesting to note that the petitioner develops his arguments in the guise of whether the trial court erred in failing to state that the errors, if any, were harmless beyond a reasonable doubt. The assertion is meritless. Petitioner's reliance on *Harrington* v. *California,* 395 U. S. 250 (1969), and *Chapman* v. *California,* 386 U. S. 18 (1967), is obviously misplaced.

Respondent has briefly reviewed the petitioner's grounds supporting his application for certiorari in order to show that none of the issues presented for review merit serious consideration. As stated in Rule 19 of the Supreme Court Rules, the granting of a review on a petition for writ of certiorari is purely within the discretion of the Court. Ordinarily a writ will be granted only where there are special and important reasons therefor. See *Hardin* v. *Kentucky Utilities Company,* 390 U. S. 1 (1968); *United States* v. *Oregon,* 366 U. S. 643 (1961); and *Rudolph* v. *United States,* 370 U. S. 269 (1962).

In view of the requirements of Rule 19, it is clear that the petitioner has failed to demonstrate a compelling need for a review of the Opinion of the Court of Appeals of Kentucky.

CONCLUSION

In the course of its jurisdictional argument, the respondent has endeavored to point out the deficiencies of the petitioner's request for a writ of certiorari under 28 U.S.C. 1257(3) and Rule 19. To this end, the respondent has discussed briefly the nature of the issues involved and, further, has demonstrated that the petitioner has failed to satisfy either the requirements of §1257(3) or the standards as set forth in Rule 19. Since the petitioner has apparently failed to overcome the initial jurisdictional and discretionary barriers preventing review, further treatment and discussion of the merits is not warranted.

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General
By: JAMES L. DICKINSON
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
GEORGE M. GEOGHEGAN, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

PROOF OF SERVICE

I, George M. Geoghegan, Jr., one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of September, 1978, I served the petitioner with Brief for Respondent in Opposition to Petition for a Writ of Certiorari by placing three (3) copies of the same in the United States mail, first-class postage prepaid, and addressed to Honorable John Y. Brown, Sr., Brown, Sledd & McCann, PSC, 300 West Short Street, Lexington, Kentucky 40507, Counsel for Petitioner, and served the Commonwealth's Attorney by placing one (1) copy of same in the United States mail, first-class postage prepaid, and addressed to Honorable Reuben G. Walker, Assistant Commonwealth's Attorney, 214 North Second Street, Richmond, Kentucky 40475.

George M. Geoghegan, Jr.

GEORGE M. GEOGHEGAN, JR.
Assistant Attorney General